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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1135

HARRY H. LEVY,

Petitioner,

against

GLICKMAN CORPORATION, LOUIS GLICKMAN, LOUIS A. SIEGEL, AARON KATZ, WILLIAM M. JENNINGS, WILLIAM G. DILLON, BACHE & CO., HIRSCH & CO., INCORPORATED, HIRSCH & CO. and MORRIS COHON & COMPANY,

and

MURRAY J. FOX, DOROTHEA FOX, SOL FOX and SYLVIA FROST, on behalf of themselves, and as representatives of all other persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Questions Presented

Should this Court consider:

1. Whether the Court of Appeals correctly affirmed the District Court's order denying petitioner leave to intervene under Fed. R. Civ. P. 24(a) as of right where (a)

the Court of Appeals concluded that petitioner would not be bound by any judgment in this action and (b) petitioner did not establish that the representation of his interest by existing parties is or may be inadequate.

2. Whether the Court of Appeals correctly affirmed the District Court's order denying petitioner leave to intervene under Fed. R. Civ. P. 24(b) (permissive intervention) where the Court concluded that the District Court did not abuse its discretion.

Statement of the Case

This action was commenced on March 20, 1963 in the United States District Court for the Southern District of New York. Subsequently, two companion actions were commenced in the same court on June 18, 1963 and October 1, 1963. All three actions are spurious class actions under Rule 23(a) (3) of the Federal Rules of Civil Procedure, and all relate essentially to the same basic set of facts, that is, the veracity of several registration statements filed with the Securities and Exchange Commission in connection with public offerings of capital stock of respondent Glickman Corporation. All of the cases involve alleged violations of the Securities Act of 1933 and the Securities Exchange Act of 1934.

On January 23, 1964, all three actions were referred to Judge Charles M. Metzner for all purposes pursuant to Rule 2 of the General Rules of the United States District Court for the Southern District of New York. Both before and after the referral, extensive pre-trial discovery was held. On October 13, 1964 Judge Metzner called a pre-trial conference, and on November 9, 1964 issued an order covering all three actions which, in substance, directed that the parties complete production of all documentary

evidence by November 23, 1964, and all depositions by December 31, 1964. Further detailed provisions were made in this order with respect to subsidiary motions, the records of the Securities and Exchange Commission, and the validity of the cross claims by various defendants against each other. The parties were directed to exchange pre-trial memoranda by March 9, 1965 and a conference was scheduled for March 23, 1965 to prepare a pre-trial order. The trial was ordered to commence on May 4, 1965.*

Subsequent to the issuance of the order, the parties continued extensive pre-trial discovery. By March 1965, most of this discovery, which included day to day depositions over a period of almost two months, had been completed and the parties were preparing for the trial scheduled to commence in May. On March 9, 1965 the parties submitted their pre-trial memoranda to the Court. During this period the parties were meeting on an almost daily basis in order to draft a pre-trial order which included the designation of the documentary evidence (consisting of many hundreds of documents) to be offered at trial.

On March 16, 1965 petitioner served his motion to intervene. Petitioner adopted in its entirety the amended complaint in the *Fox* action and sought only to add as an addendum thereto certain facts underlying his ownership of stock of Glickman Corporation. He alleged in the proposed addendum that he purchased 2,000 shares of the Class A Common Stock of defendant Glickman Corporation on October 5, 1961, but he had learned only on August 25, 1964 that there were some alleged untrue statements in the prospectus of defendant Glickman Corpora-

* The trial date was subsequently adjourned to May 17, 1965.

tion. He gave no explanation for his failure to move to intervene prior to March 1965.

Petitioner did not state before the District Court or the Court of Appeals whether he was seeking to intervene under Fed. R. Civ. P. 24(a) as of right or under Rule 24(b) with the court's permission. On June 25, 1965 the District Court, however, denied his motion, treating it as one made under Rule 24(b). It may well have been impelled to consider this motion under that section by petitioner's failure to even allege that the existing representation of his interest was inadequate, an express requirement of Rule 24(a). On December 20, 1965 the Court of Appeals for the Second Circuit unanimously affirmed in an opinion which discussed petitioner's rights under both Rule 24(a) and (b). Petitioner now seeks review of that Court's decision and opinion.

ARGUMENT

POINT I

Petitioner has not established that there is any conflict of decision with respect to the Second Circuit's interpretation of Rule 24(a) nor does he even purport to establish the importance of the decision below; there is no basis for the granting of the writ of certiorari.

The Court of Appeals held that petitioner had no right to intervene in this action under Rule 24(a) because he did not show that he "is or may be bound by a judgment in the action". Petitioner argues now, as he did before the Court of Appeals, that other circuits have held that in a spurious class action members of the class who are

not parties to the action are bound by any judgment rendered. As the Court of Appeals observed, petitioner did not demonstrate any conflict in the decisions, and inasmuch as he now relies primarily on the same cases, this Court should reach the same conclusion.

Petitioner argues that in *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84 (7th Cir. 1941), the Court of Appeals for the Seventh Circuit held, contrary to the Second Circuit, that in a spurious class action, members of the class who are not parties to the action are bound by any judgment rendered therein. The Second Circuit did not find any such conflict in its opinion below, and neither presumably would the Seventh Circuit in view of its own interpretation of *Weeks* in *Kainz* v. *Anheuser-Busch, Inc.*, 194 F. 2d 737 (7th Cir. 1952), *cert. denied*, 344 U. S. 820 (1952):

> "At any rate, the law of this circuit, by virtue of Weeks *v.* Bareco Oil Co., supra, is that where the tort complained of by each plaintiff is the same and is claimed to have damaged each of the plaintiffs in the same manner, plaintiffs may join under Rule 20(a) or maintain the suit as a spurious class suit under Rule 23(a)(3), though the judgments are several and no one is bound unless he is present." (194 F. 2d at 742)

The Seventh Circuit reaffirmed the foregoing in *Hurd* v. *Illinois Bell Telephone Co.*, 234 F. 2d 942 (7th Cir. 1956), *cert. denied*, 352 U. S. 918 (1956), where it said:

> "Here we are dealing with a spurious class action, * * * In such an action, separate judgments are entered 'and no one is bound unless he is present' Kainz *v.* Anheuser-Busch, Inc., 194 F. 2d at page 742. Therefore, petitioner is not bound by the judgment and is not, we believe, entitled to intervene on appeal as a matter of right." (234 F. 2d at 944)

There is no present conflict on this issue between the Second and Eighth Circuits.

Petitioner also contends that a conflict exists between the Second and Tenth Circuits, but as the Second Circuit stated, *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F. 2d 561 (10th Cir. 1961), *petition for cert. dismissed* 371 U. S. 801 (1962) raises no such conflict, for the sole relevant issue there was "whether in a class action under Rule 23(a)(3) * * * non-participating plaintiffs may intervene after determination of defendants' liability, to share in the fruits of a judgment obtained by their participating representatives" (300 F. 2d at 588).

Contrary to petitioner's argument there is presently agreement, rather than conflict, among the circuits on the question of the effect of a judgment in a spurious class action on those members of the class who do not participate in the action.

Petitioner in his first argument also contends that there is a conflict of decisions with respect to the meaning of the phrase set forth in Rule 24(a) "is or may be bound by a judgment in the action." The meaning of this phrase, however, is not an issue in the case, and the Second Circuit did not even refer to it in its opinion. Moreover, assuming *arguendo* that it has some relevance, the Court will find that petitioner has failed to establish a conflict with respect to this extraneous issue.

Kozak v. *Wells*, 278 F. 2d 104 (8th Cir. 1960), relied upon by petitioner, was not a spurious class action, but rather a dispute between two groups of claimants to one tract of land, and the Court concluded that the "controversy would best be settled, if possible, in single prompt litigation in one forum." It permitted intervention, but with respect to the interpretation of the phrase "may be bound", expressly stated that "each case is to be decided and explained largely on its own * * *"

In *Stadin* v. *Union Electric Co.*, 309 F. 2d 912 (8th Cir. 1962), *cert. denied*, 373 U. S. 915 (1963) which also was not a spurious class action, the Eighth Circuit explained its decision in *Kozak:*

> "We had occasion in Kozak *v.* Wells, supra, to consider the significance of this language in Rule 24(a) (2). We there concluded, * * * that the Rule generally was to be given a liberal interpretation, and that 'perhaps each case is to be decided and explained largely on its own facts'."
>
> Liberality, however, does not equate with rights of indiscriminate intervention. The applicant must still meet the requirement that he 'is or may be bound' by the judgments. The consequences of adverse judgments in the main action are not nearly so evident here as they were in Kozak *v.* Wells, with the presence of factors (legal effectiveness of attacks against a state court order and judgment; existence and propriety of the defendants' acts) which we there specifically point out." (309 F. 2d at 918)

The Eighth Circuit has no general rule with respect to this issue, and certainly no conflict exists between it and any other circuit.

Similarly, *Atlantic Refining Co.* v. *Standard Oil Co.*, 304 F. 2d 387 (D.C. Cir. 1962) does not conflict with the opinion of any other circuit. Furthermore, this case does not stand for the rule, as petitioner contends, that a person may be bound under Rule 24(a) even though the principal of *res judicata* would not apply. The Court expressly said:

> "It is now well settled that in conventional litigation, the test to be applied in determining whether an applicant for intervention under Rule 24(a) (2) will be bound by a judgment in the action is whether he would be bound by such judgment under the doctrine of res judicata." (304 F. 2d at 393)

It went on to allow intervention because a judgment in the particular type of case before it (an action brought by a private person to have an order or regulation of an administrative agency adjudged invalid) would be as "final and conclusive to them as if they were bound by it under the doctrine of res judicata." This Court's decision in *Sam Fox Pub. Co.* v. *United States,* 366 U. S. 683 (1960) directly contradicts petitioner's argument for it was expressly stated therein that the applicant for intervention had to be legally bound, "which is what must be made out before a party may intervene as of right." (366 U. S. at 694)

To conclude, petitioner has not shown any existing conflict between the decision of the Second Circuit below and any other circuit. He has failed to set forth the exact rule of law subject to different treatment by the circuits and which petitioner believes should be clarified. He does state that "[i]t appears important to have the law on intervention of right in a spurious class action definitively resolved" but this broad and abstract statement is not a sufficient basis for the granting of the Writ of Certiorari. Inasmuch as he has failed to establish either the existence or importance of a present conflict that needs to be resolved, his petition is without foundation.

POINT II

Petitioner's argument that intervention in a spurious class action should always be a matter of right has no statutory, decisional or logical support.

Petitioner's second argument is that in a spurious class action, intervention should always be a matter of right.

In support of this thesis, he asserts that there is some conflict among the circuits on his right to intervene to

prove damages after judgment has been rendered for plaintiffs in a spurious class action; that he is therefore in an uncertain legal position; that, by necessity, the representation of his interest in a spurious class action is inadequate; that therefore the law should be settled that in a spurious class action, intervention should be available as of right.

Again, petitioner has failed to show any conflict of decision; indeed, he fails to cite any real authority for his entire second argument.

Thus, petitioner contends that he may not be able to intervene to prove his damages if the Second Circuit follows its decision in *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331, 336 (2d Cir. 1953), *cert. denied* 345 U. S. 994 (1954). He also contends that the decision in *Bascom* was contrary to the holding of the Tenth Circuit in *Union Carbide & Carbon Corp.* v. *Nisley,* 300 F. 2d 561 (10th Cir. 1962), petition for cert. dismissed 371 U. S. 801 (1962). The problem with this line of reasoning is that in its opinion below the Second Circuit said:

> "Of course, if the settlement should not be consummated and defendants' liability should be established, the denial of Levy's instant motion ought not to prejudice a further application by him to intervene for the purpose of proving his damages." (A-9)

The foregoing amply rebuts petitioner's contention that he faces a "trap" if he is not permitted to intervene. The answer is that he will be permitted to intervene if plaintiffs prevail. On the other hand, the possibility that defendants will prevail does not mean, as petitioner seems to argue, that the existing representation of his interest is inadequate. Certainly, there is no case which supports this interpretation of Rule 24. If inadequacy of repre-

sentation were equated with the possibility that defendant might prevail, then this express requirement of Rule 24(a) would have no meaning, for this condition exists in every case. Finally, petitioner argues that inasmuch as none of the actual parties will prove petitioner's particular damages, the representation of his interest must be inadequate. This argument was expressly rejected by the Second Circuit on the grounds that he would be allowed to intervene for the purpose of proving damages. Subsequent events also rendered this argument moot because petitioner actually appeared at a hearing with respect to a proposed settlement of these actions and objected to the settlement.*

Petitioner's second argument, therefore, fails to establish either a conflict of decisions, a question of fundamental importance, or that he has been prejudiced by the decision below.

POINT III

Whether the District Court abused its discretion in denying petitioner's motion is not a sufficient basis for granting the writ of certiorari; furthermore, the District Court did not abuse its discretion.

Petitioner argues in his third argument that in treating his application as one for permissive intervention, the Courts below should not have considered that petitioner could be heard in objection to a proposed compromise and settlement of the action. This statement assumes too much, for the District Court did not refer to the proposed compromise in its decision but denied the motion "since at the time it was made all pre-trial procedures had been completed and the attorneys in the various actions were preparing a final pre-trial order

* The settlement was subsequently approved by the District Court in an opinion filed on May 3, 1966.

looking toward a trial on May 17, 1965 of those actions which had been pending since March, 1963." (A-11)

While the Court of Appeals did allude to a proposed settlement, it expressly set forth other considerations, namely, "[a]llowing intervention in a case like this with respect to the merits, as distinguised from the limited purpose of proving damages, may well result in accumulating proofs and arguments without assisting the Court. *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 141-142 (1944); see also *Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore, Inc.* 51 F. Supp. 972, 973 (D. Mass. 1943)."

Petitioner is saying here that the courts below denied his motion solely because he would be afforded an opportunity to object to a proposed settlement of this action. There is no support in the record for this argument, and in the absence of such support, petitioner's actual argument is reduced to a claim that the Courts below improperly exercised their discretion in denying his application. This is clearly not a sufficient ground for granting a petition of certiorari. "The exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown * * *" *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 142 (1944). "[O]nly rarely, if ever, could it be shown that a District Court abused its discretion in denying permissive intervention. See 2 Moore's Federal Practice, supra, p. 2371." *Cameron* v. *President & Fellows of Harvard College*, 157 F. 2d 993, 997 (1st Cir. 1946). Here, respondents submit that the record affirmatively demonstrates that Judge Metzner's decision was also based on the following facts:

(1) The trial of this action was about to commence, and all pre-trial proceedings were completed.

(2) Appellant had not explained his failure to bring his motion at an earlier stage of the action, even though he had full opportunity to do so.

(3) Appellant had not set forth any new facts or violations of law which would assist the District Court in resolving the action.

In view of these indisputable facts, ignored by petitioner, no basis exists for the granting of the Writ of Certiorari.

POINT IV

The decision below has no implication beyond this case.

Petitioner's basic arguments are that "[i]t appears important to have the law on intervention of right in a spurious class action definitively resolved" (Petitioner's Brief, p. 11) and that intervention should always be a matter of right in a spurious class action. Whether the present law needs to be clarified or resolved is a moot question for as this Court knows, Rules 23 and 24 have been amended as of July 1, 1966. The questions raised by petitioner relate solely to Rules 23 and 24 in their present form, and consequently they are important, if at all, only in this particular case; their resolution will not be of general importance.

There is no need to undertake an analysis of the amended rules here; this Court has a far greater understanding of the scope of the amendment. It is sufficient to state that the amendment works an extensive, indeed a radical change in Rule 23. Furthermore, as the Advisory Committee's Notes indicate, one of the purposes of the amendment was to resolve issues raised by the spurious class action, in particular the propriety of permitting

members of the class to intervene after a verdict favorable to plaintiffs even though they would not have been bound by a verdict adverse to plaintiffs.

> "Hitherto, in a few actions conducted as spurious class actions and thus nominally designed to extend only to parties and others intervening *before* the determination of liability, courts have held or intimated that class members might be permitted to intervene *after* a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by the unfavorable decision.
>
> * * * * *
>
> Under proposed subdivision (c) (3) one-way intervention is excluded; the action or non-class action, and in the former case the judgment, whether or not favorable, will include the class, as above stated."

Rule 24(a) has also been changed to permit intervention as of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest * * *." This amendment and the amendment to Rule 23 would obviously affect any decision of this Court in this case setting forth the relationship between these two rules in their present form. In light of the amendments, any such decision would not furnish any guidance to the Courts in the future.

No further analysis is needed. If the writ is granted in this case, the questions raised here will be of no importance by the time the case is heard on the merits. They will have been resolved or rendered inconsequential by the amendments, and any decision in this case will affect only the parties in this action. On this basis, the petition should be denied.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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